IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CIVIL ACTION NO. 10-480
	:	
v.	:	
	:	
ANTHONY GAGLIARDI	:	CRIMINAL ACTION NO. 04-796

MEMORANDUM

Padova, J. **April 6, 2011**

Pro se Defendant Anthony Gagliardi, who is serving a sentence of 180 months for conspiracy to distribute cocaine and attempted possession with intent to distribute between 500 grams and two kilograms of cocaine, filed a Motion pursuant to Fed. R. Civ. P. 60(b) seeking relief from our June 1, 2010 Memorandum and Order denying his Pro Se Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255. For the following reasons, we deny the Motion in part and dismiss it in part.

I. FACTUAL AND PROCEDURAL BACKGROUND

Our June 1, 2010 Memorandum aptly summarized the relevant background as follows:

> On May 27, 2005, Defendant was found guilty of conspiracy to distribute cocaine, (Count One) and attempted possession with intent to distribute between 500 grams and two kilograms of cocaine on October 29, 2002 (Count Three). The jury returned not guilty verdicts on additional counts of possession with the intent to distribute more than five kilograms of cocaine on October 8 or 9, 2002 (Count Two) and attempted possession with intent to distribute between 500 grams and two kilograms of cocaine on December 8, 2002 (Count IV). Although he originally retained counsel, Defendant filed a pre-trial motion seeking to represent himself. Following the required colloquy, we permitted Defendant to represent himself, with his prior attorney, Donald Manno, serving as standby counsel.
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> On July 5, 2005, we denied Defendant's post-trial motion. He was sentenced on August 17, 2006, to 180 months imprisonment, to be followed by eight years of supervised release. By memorandum dated July 3, 2008, the United States Court of Appeals for the Third

> Circuit thoroughly analyzed each argument made by Defendant and affirmed the convictions. United States v. Gagliardi, 285 Fed. Appx. 11 (3d Cir. 2008). The United States Supreme Court denied Defendant's petition for certiorari on March 29, 2009. Defendant's § 2255 motion was timely filed on February 2, 2010.

United States v. Gagliardi, Civ. A. No. 10-480, Crim. A. No. 04-796, 2010 WL 2253736, at *1 (E.D. Pa. June 1, 2010) (footnotes omitted). In his § 2255 Motion, Defendant raised the following issues:

1. The juror misconduct issue raised on direct appeal arising from an allegedly improper discussion during deliberation between a deliberating juror and an alternate juror.
2. Ineffective assistance of counsel arising from Attorney Manno's failure to raise the prejudice resulting from the juror misconduct.
3. The two Brady violations raised on direct appeal.
4. The Rule 404(b) violations raised on direct appeal arising from the references to marijuana and loan sharking activities.
5. The bill of particulars issue raised on direct appeal.
6. The prosecutorial misconduct issues raised on direct appeal.
7. Improper jury instruction on the definition of reasonable doubt.
8. Structural error arising from egregious activity on the part of the Government causing Defendant to change his mind and not call Antonio Nieves as a witness.

Id. On June 1, 2010, we issued a Memorandum and Order denying Defendant's § 2255 Motion in its entirety and declining to issue a certificate of appealability. On July 17, 2010, Defendant filed a motion for a certificate of appealability, which we construed as a motion to reconsider our June 1, 2010 Order and Memorandum denying the certificate of appealability. On July 21, 2010, we denied the motion on the grounds that Defendant had presented no new evidence, that the controlling law had not changed, that Defendant did not demonstrate clear error or manifest injustice, and that the motion was untimely. On October 28, 2010, the United States Court of Appeals for the Third Circuit denied Defendant's request for a certificate of appealability. On February 17, 2011,

Defendant filed a Rule 60(b) Motion seeking relief from our June 1, 2010 Memorandum and Order.

II. LEGAL STANDARD

Rule 60(b) provides, in relevant part, that relief from a judgment may be granted on the following grounds:

> (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b). The general purpose of Rule 60(b) is "to strike a proper balance between the conflicting principles that litigation must be brought to an end and that justice must be done." Boughner v. Sec'y of Health, Educ. and Welfare, 572 F.2d 976, 977 (3d Cir. 1978) (citation omitted). "[R]elief from a judgment under Rule 60(b) should be granted only in exceptional circumstances." Id. (citations omitted). Thus, a "Rule 60(b) motion may not be used as a substitute for appeal, and . . . legal error, without more, cannot justify granting a Rule 60(b) motion." Smith v. Evans, 853 F.2d 155, 158 (3d Cir. 1988) (citations omitted).

The Antiterrorism and Effective Death Penalty Act of 1966 ("AEDPA"), 28 U.S.C. §§ 2241-2266, governs the right of all prisoners to file a petition in federal court seeking the issuance of a writ of habeas corpus. AEDPA imposes "a series of restrictive gatekeeping conditions which must be satisfied for a prisoner to prevail" on a habeas petition. Diventura v. Wynder, Civ. A. Nos. 07-2846, 07-3975, 2007 WL 3252607, at *1 (E.D. Pa. Oct. 31, 2007). One such condition is the "second or successive rule," which forbids a federal prisoner from filing a second habeas petition, after an

earlier petition was dismissed with prejudice, without first obtaining a certification from the appropriate court of appeals. See 28 U.S.C. § 2255(h).

"AEDPA did not expressly circumscribe the operation of Rule 60(b)." Gonzalez v. Crosby, 545 U.S. 524, 529 (2005).[1] However, "Rule 60(b), like the rest of the Rules of Civil Procedure, applies in habeas corpus proceedings . . . only to the extent that it is not inconsistent with applicable federal statutory provisions and rules." Id. (footnote omitted) (quotation and citation omitted); Fed. R. Civ. P. 81(a)(4). Rule 60(b) is inconsistent with AEDPA to the extent that it would allow a movant to "circumvent the requirement that a successive habeas petition be precertified by the court of appeals." Gonazlez, 545 U.S. at 531. Thus, "when [a] Rule 60(b) motion seeks to collaterally attack the petitioner's underlying conviction, the motion should be treated as a successive habeas petition." Pridgen v. Shannon, 380 F.3d 721, 727 (3d Cir. 2004). Only "in those instances in which the factual predicate of a petitioner's Rule 60(b) motion attacks the manner in which the earlier habeas judgment was procured and not the underlying conviction" may the Rule 60(b) motion "be adjudicated on the merits." Id.

III. DISCUSSION

The Government contends that Defendant's purported Rule 60(b) Motion must be construed as a second or successive habeas petition and dismissed in its entirety for failure to obtain certification from the Third Circuit. Defendant maintains that his Motion is properly analyzed in the

[1]In Gonzalez, the Supreme Court considered "only the extent to which Rule 60(b) applies to habeas proceedings under 28 U.S.C. § 2254, which governs federal habeas relief for prisoners convicted in state court." Id. at 529 n.3. However, the United States Court of Appeals for the Third Circuit has applied Gonzalez to petitions brought pursuant to 28 U.S.C. § 2255, which governs federal habeas relief for prisoners convicted in federal court. See Schweitzer v. United States, 215 F. App'x 120 (3d Cir. 2007).

context of Rule 60(b) because it attacks the manner in which the earlier habeas judgment was procured and does not collaterally attack his conviction.[2]

Defendant's Motion challenges our June 1, 2010 Order and Memorandum in three respects.[3] First, Defendant argues that we violated his constitutional rights by concluding that seven of the eight claims he asserted in his § 2255 petition were procedurally defaulted and in dismissing them without considering them on the merits. (Def. Mot. at 4-9.) Second, Defendant argues that we erred in rejecting, on the merits, his eight claim, which asserted that his standby counsel rendered ineffective assistance in failing to argue the issue of juror misconduct. (Id. at 10.) Third, Defendant argues that he is entitled to a writ of habeas corpus for a number of reasons. (Id. at 11-17.) We conclude that Defendant's first argument challenges the manner in which the earlier habeas judgment

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[2]Defendant also takes the position that, because he is pro se, we cannot construe his Motion as a habeas petition without warning him of the consequences and offering him the opportunity either to withdraw his Motion or to contest our construction. (Def. Mot. at 3-4 (citing, among others, Castro v. United States, 540 U.S. 375 (2003).) Defendant misunderstands the scope of the Castro holding. In Castro, the Supreme Court held that before a district court can recharacterize a pro se criminal defendant's post-trial motion as a habeas petition, the court "must notify the pro se litigant that it intends to recharacterize the pleading, warn the litigant that this recharacterization means that any subsequent § 2255 motion will be subject to the restrictions on 'second or successive' motions, and provide the litigant an opportunity to withdraw the motion or to amend it so that it contains all the § 2255 claims he believes he has." 540 U.S. at 383. The Court was entirely clear, however, that "[t]he limitation applies when a court recharacterizes a pro se litigant's motion as a first § 2255 motion." Id. (emphasis added). Defendant has cited no authority that extends the Castro rule to a recharacterization of a Rule 60(b) motion as a second or successive habeas petition, and we are aware of none.

[3]Defendant also challenges our July 21, 2010 Order construing his motion for a certificate of appealability as a motion for reconsideration of our June 1, 2010 Memorandum and Order denying the certificate of appealability. (Def. Mot. at 2.) Defendant again cites Castro, and contends that we erred in recharacterizing his motion without first giving him the opportunity to withdraw the motion or contest our construction. Defendant has cited no authority that extends the Castro rule to a recharacterization of a motion for a certificate of appealability as a motion for reconsideration, and we are aware of none. Therefore, we deny Defendant's Motion insofar as it seeks relief from our July 21, 2010 Order.

was procured and is, therefore, properly asserted in the context of a Rule 60(b) Motion. See Diventura, 2007 WL 3252607, at *3 n.3 ("An example of such a case where the court could consider such a Rule 60(b) motion is where the previous habeas decision was denied without merits consideration, and the prisoner attacks solely the basis of how that previous non-merits decision was procured . . . such as attacks on how the previous habeas case was found by the court to be procedurally defaulted . . . ."); see also Gonzalez, 545 U.S. at 532 n.4 (stating that a movant is not "making a habeas corpus claim" when he "merely asserts that a previous ruling which precluded a merits determination was in error-for example, a denial for such reasons as failure to exhaust, [or] procedural default"). Defendant's challenge to our adjudication of his ineffective assistance of counsel claim, on the other hand, collaterally attacks his conviction and must, therefore, be considered in the context of a second or successive habeas petition. See Gonzalez, 545 U.S. at 532 ("[A]lleging that the court erred in denying habeas relief on the merits is effectively indistinguishable from alleging that the movant is, under the substantive provisions of the statutes, entitled to habeas relief."). Similarly, Defendant's arguments as to why he is entitled to a writ of habeas corpus collaterally attack his conviction and must be considered in the context of a second or successive habeas petition. Id. at 532 n.4 ("When a movant asserts" that "there exist . . . grounds entitling [him] to habeas corpus relief," the movant "is making a habeas corpus claim."). Because Defendant did not obtain the requisite certification from the Third Circuit, see 28 U.S.C. § 2255(h), we must dismiss the Motion insofar as it constitutes a second or successive habeas petition. Accordingly, we proceed to consider only whether Defendant is entitled to relief from our June 1, 2010 Memorandum and Order dismissing the procedurally defaulted claims in his habeas petition.

Our June 1, 2010 Order and Memorandum dismissed five of Defendant's eight claims on the

ground that they were raised, litigated, and rejected on direct appeal, and were, consequently, procedurally defaulted. Gagliardi, 2010 WL 2253736, at *2 ("Absent a change in the governing substantive law or other exceptional circumstances, Section 2255 generally 'may not be employed to relitigate questions which were raised and considered on direct appeal.'" (quoting United States v. DeRewal, 10 F.3d 100, 105 n.4 (3d Cir. 1993), and citing Davis v. United States, 417 U.S. 333, 342 (1974))). We dismissed two of Defendant's other claims on the ground that they could have been raised on direct appeal and were also, consequently, procedurally defaulted. Id. at *2-3 ("A defendant cannot raise in a 2255 motion a constitutional issue that he could have raised on direct appeal, but did not, unless he shows good cause for, and actual prejudice from his failure to raise the claim on appeal, or demonstrates that he is 'actually innocent' of a crime charged." (quoting Massaro v. United States, 538 U.S. 500, 504 (2003), and citing United States v. Jenkins, 333 F.3d 151, 155 (3d Cir. 2003), and Hodge v. United States, 554 F.3d 372, 379 (3d Cir. 2009))). Defendant does not challenge our determinations that he did raise or could have raised these claims on direct appeal. Rather, Defendant argues that Rule 4(b) of the Rules Governing Section 2255 Proceedings and the Due Process Clause of the Fifth Amendment to the United States Constitution required us to "conduct[] complete examination of all prior court proceedings" and "review the correct claims [and] their merits" before applying "a procedural default bar."[4] (Id. at 7-9.) We disagree.

[4]We note that, with respect to our dismissal of his procedurally defaulted claims, Defendant does not "assert . . . that he is entitled to relief from our prior judgment under any of the enumerated grounds of Rule 60(b), i.e., he does not allege any 'mistake,' 'newly discovered evidence' or 'fraud' as to our decision regarding his habeas petition." Morales v. Wynder, Civ. A. No. 07-1884, 2007 WL 1461802, at *1 (E.D. Pa. May 17, 2007). Nonetheless, we recognize that Defendant is pro se, and we will "liberally construe[]" his Motion. See Estelle v. Gamble, 429 U.S. 97, 106 (1976). The most appropriate provision of Rule 60(b) for Defendant's arguments is "the catch-all reason set forth in subsection (b)(6), i.e., 'any other reason that justifies relief.'" Zuniga v. Pennsylvania Bd. of Prob. and Parole, Civ. A. No. 05-5517, 2008 WL 2510155, at *1 (E.D. Pa. June 19, 2008). "[O]nly

Defendant's first argument is that Rule 4(b) of the Rules Governing Section 2255 Proceedings required us to consider on the merits the seven claims that he raised or could have raised on direct appeal. Rule 4(b), in its entirety, provides as follows:

> The judge who receives the motion must promptly examine it. If it plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief, the judge must dismiss the motion and direct the clerk to notify the moving party. If the motion is not dismissed, the judge must order the United States attorney to file an answer, motion, or other response within a fixed time, or to take other action the judge may order.

Nothing in this rule required us to disregard the doctrine of procedural default and allow Defendant to relitigate claims that he raised or could have raised on direct appeal. Defendant cites no authority to support his argument, and we have found none.

Defendant's second argument is that the Due Process Clause required us to consider his claims on the merits, because his § 2255 motion "raise[d] doubts concerning the fairness of the original proceedings." (Def. Mot. at 7.) Defendant did not in his § 2255 petition and does not here argue that his claims fall within a recognized exception to the doctrine of procedural default. Instead, he argues generally that his right to due process and the ends of justice entitled him to an evidentiary hearing and a consideration of his claims on the merits. The actual innocence exception is the exclusive avenue for such claims. See Schlup v. Delo, 513 U.S. 298, 319, 321-22 (1995) ("This Court has consistently relied on the equitable nature of habeas corpus to preclude application of strict rules of res judicata. . . . [However,] [t]o ensure that the fundamental miscarriage of justice exception would remain rare and would only be applied in the extraordinary case, while at the same

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'extraordinary, and special circumstances' justify relief under Rule 60(b)(6)." Prigden, 380 F.3d at 728 (quoting Page v. Schweiker, 786 F.2d 150, 158 (3rd Cir. 1986)).

time ensuring that the exception would extend relief to those who were truly deserving, this Court [has] explicitly tied the miscarriage of justice exception to the petitioner's innocence. . . . [This] accommodates both the systemic interests in finality, comity, and conservation of judicial resources, and the overriding individual interest in doing justice in the extraordinary case." (quotations omitted) (citing Sanders v. United States, 373 U.S. 1 (1963), and Murray v. Carrier, 477 U.S. 478 (1986))). Defendant has presented no evidence that he is actually innocent. Accordingly, we conclude that the Due Process Clause did not require us to consider his claims on the merits.

Neither Rule 4(b) of the Rules Governing Section 2255 Proceedings nor the Due Process Clause of the Fifth Amendment required us to consider Defendant's procedurally defaulted claims on the merits. Our dismissal of those claims was not error, and Defendant's arguments to the contrary do not present the sort of "exceptional circumstances" necessary to justify relief under Rule 60(b). See Boughner, 572 F.2d at 977 (citations omitted). Therefore, we deny Defendant's Rule 60(b) Motion insofar as it seeks relief from our June 1, 2010 Memorandum and Order dismissing those claims.

IV. CONCLUSION

For the foregoing reasons, we conclude that Defendant is not entitled to relief under Rule 60(b) from our June 1, 2010 Memorandum and Order dismissing the procedurally defaulted claims asserted in Defendant's § 2255 petition without considering them on the merits. We therefore deny Defendant's Motion insofar as it seeks such relief. We further conclude that, insofar as Defendant's Motion challenges our adjudication of his ineffective assistance of counsel claim and asserts that he is entitled to a writ of habeas corpus, Defendant's Motion is, despite its label, a second or successive habeas petition. Because Defendant has not obtained the requisite certification from the Third

Circuit, we dismiss his Motion insofar as it constitutes a second or successive habeas petition.

An appropriate Order follows.

BY THE COURT:

/s/ John R. Padova
John R. Padova, J.

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ORDER

AND NOW, this 6th day of April, 2011, upon consideration of Defendant Anthony Gagliardi's Pro Se Motion Pursuant to Rule 60(b) (Docket No. 246), and the Government's response thereto, and for the reasons stated in the accompanying Memorandum, **IT IS HEREBY ORDERED** that the Motion is **DENIED IN PART** and **DISMISSED IN PART** as follows:

1. The Motion is **DENIED** insofar as it seeks relief from our July 21, 2010 Order and insofar as it seeks relief from our June 1, 2010 Order and Memorandum dismissing Defendant's procedurally defaulted claims.

2. The Motion is construed as a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2255 and **DISMISSED** insofar as it seeks relief from our June 1, 2010 Order and Memorandum rejecting Defendant's ineffective assistance of counsel claim and insofar as it argues that Defendant is entitled to the issuance of a writ of habeas corpus.

3. The Clerk of Court shall close this case.

BY THE COURT:

/s/ John R. Padova

John R. Padova, J.